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SUPREME COURT OF THE UNITED STATES

CASE NO. 85-1793

October 1985 Term

LOUIE L. WAINWRIGHT,
Secretary, Florida Department
of Corrections,

Petitioner,

vs.

JIMMY LEE SMITH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

Cases	Page
Autry v. Estelle, 719 F.2d 1247 (5th Cir. 1983)	6
Barefoot v. Estelle, 463 U.S. 880 (1983)	7
Blackledge v. Allison, 431 U.S. 63 (1977)	2
Dillard v. Blackburn, 780 F.2d 509 (5th Cir. 1986)	4
Harris v. Nelson, 394 U.S. 286 (1969)	4
Hill v. Linahan, 697 F.2d 1032 (11th Cir. 1983)	3
Johnson v. Massey, 516 F.2d 1001 (5th Cir. 1975)	8
McDonnell v. Estelle, 666 F.2d 241 (5th Cir. 1982)	3
Smith v. Wainwright, 777 F.2d 609 (11th Cir. 1985)	3, 8
Stephens v. Kemp, 721 F.2d 1300 (11th Cir. 1983), cert. denied, 469 U.S. 1043 (1984)	6

Others

28 U.S.C. §2246 5

Rules 17.1(a) and (c), Rules of the Supreme Court of the United States 8

Rule 22.5, Rules of the Supreme Court of the United States 1

Rule 1, Federal Rules of Civil Procedure 8

Rule 56(c), Federal Rules of Civil Procedure 2, 5, 8

Rule 7(c), Rules Governing Section 2254 Cases in the United States District Courts 5

Rule 11, Rules Governing Section 2254 Cases in the United States District Courts 4, 5

Rule 3(F), Rules of the United States District Court for the Northern District of Florida 5

ARGUMENT

Louie L. Wainwright stands on the legal arguments advanced in his petition for writ of certiorari. He files this reply brief solely to address an argument first raised by Respondent Jimmy Lee Smith concerning Issue II[1] in his response in opposition to said petition. Rule 22.5, Rules of the Supreme Court of the United States.

Smith claims that whenever a state prison superintendent opposes a federal petition for writ of habeas corpus and motion for a stay of execution by appending a verified affidavit to a motion for summary judgment, Rule 56(c) of the Federal

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ISSUE II:

MAY AN UNREBUTTED AFFIDAVIT FROM TRIAL DEFENSE COUNSEL NEGATE THE NEED FOR AN EVIDENTIARY HEARING INTO HIS ALLEGED INEFFECTIVENESS UPON PETITION FOR WRIT OF HABEAS CORPUS?

Rules of Civil Procedure requires that a hearing upon such motion may not be scheduled for less than 10 days following its service, in order to afford the prisoner adequate time to submit a counter-affidavit (Resp. at 21-24). Given that a Florida death warrant may generally be carried out for only a brief period roughly one month after it is signed by the Governor,[2] the logical upshot of Smith's position is that a Florida death-sentenced inmate such as himself can deprive the government of its right to effectively rely upon affidavits as authorized by Blackledge v. Allison, 431 U.S. 62 (1977) merely by delaying a federal district court challenge to his execution until less than 10 days before the scheduled date.

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[2] See Chapter 922, Florida Statutes.

Several courts, including the court below, Smith v. Wainwright, 777 F.2d 609, 616-617, note 6 (11th Cir. 1985), have had difficulty recognizing the fact that the Federal Rules of Civil Procedure are not strictly applicable to habeas corpus proceedings. See McDonnell v. Estelle, 666 F.2d 246 (5th Cir. 1982) and Hill v. Linahan, 697 F.2d 1032 (11th Cir. 1983).[3]

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[3] Hill v. Linahan holds that Rule 56(c) requires that a state habeas corpus petitioner must be given 10 days to respond to a prison superintendent's responsive pleading if it even so much as incorporates the state court trial record, which is an absolute necessity to defending most habeas actions. May a death row inmate permanently forestall his execution simply by filing his habeas petition in the federal district court less than 10 days before the scheduled date and then invoking Rule 56(c) when the government files a responsive pleading appending the state court record? This preposterous result is what Linahan and the decision below collectively suggest.

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts discretionarily provides that these rules "may be applied, where appropriate." This language comports with this Court's holding of Harris v. Nelson, 394 U.S. 286 (1969) stressing the traditional informality of, and district judge discretion over, habeas corpus proceedings. See also Dillard v. Blackburn, 780 F.2d 509 (5th Cir. 1986). Strict application of the Federal Rules of Civil Procedure to habeas corpus cases would seriously disadvantage the vast majority of habeas corpus petitioners, who unlike respondent do not enjoy the assistance of counsel.

Wainwright would agree that a habeas corpus petitoner such as Smith should ordinarily be entitled to submit counter-affidavits to those contained in a prison superintendent's response, regardless of

whether this entitlement arises pursuant to Rule 7(c) of the Rules Governing Section 2254 Cases in the United States District Courts, Rule 3(F) of Rules of the United States District Court for the Northern District of Florida, and 28 U.S.C. §2246, or pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts and Federal Rule of Civil Procedure 56 as Smith contends. But ordinarily, even assuming a district court judge issued and the government received an order to show cause simultaneously to the filing of a habeas petition, which is problematic,[4] the government would have a minimum time of at least 3 and very argua-

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[4] See generally Federal Rule of Civil Procedure 6(e).

bly 20 or more full days to respond.[5] Moreover, if the government submitted an affidavit and moved for a summary judgment, arguably at least 5 or 10 more days would pass before the judge could hold a hearing,[6] and legally afford the prisoner any relief. Here Smith inexcusably delayed in filing his petition for writ of habeas corpus with Judge Roger C. Vinson of the Federal District Court for the Northern District of Florida until 9:00 a.m. on July 9, 1984, less than 3 full days before his scheduled 7:00 a.m. July 12 execution in a transparent abuse of the writ as pled below. See Autry v. Estelle, 719 F.2d 1247 (5th Cir. 1983) and Stephens v. Kemp, 721

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[5] See 28 U.S.C. §2243 and Federal Rules of Civil Procedure 12(a-c).

[6] See 28 U.S.C. §2243 and Federal Rule of Civil Procedure 56(c).

F.2d 1300 (11th Cir. 1983), cert. denied, 469 U.S. 1043 (1984).[7] It follows that Smith necessarily waived as a matter of law all of the applicable rules, including those ordinarily securing the right to submit counteraffidavits, in order to prevent Wainwright from finding himself in a situation whereby he could arguably have lawfully carried out the warrant simply by withholding his response until the deadline. See generally Barefoot v.

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[7] This Court denied certiorari over the denial of Smith's first Florida Rule of Criminal Procedure 3.850 motion for post-conviction relief on May 29. Smith v. Florida, 467 U.S. 1220 (1984). Smith's second death warrant was signed on June 15. Smith did not file anything with any court until July 9, at which time he filed in both the state and federal courts.

Wainwright does not fault opposing counsel, whom he respects, for adopting this tried and true eleventh hour approach. Wainwright does, however, look forward to the day when such an approach will not be rewarded by the judiciary.

Estelle, 463 U.S. 880 (1983). Having waived the applicable rules in order to compel Wainwright's response and be heard by Judge Vinson, Smith was in no position to then inconsistently insist upon their enforcement. Cf. Johnson v. Massey, 516 F.2d 1001 (5th Cir. 1975).

Even if the Federal Rules of Civil Procedure are strictly applicable to habeas corpus proceedings, Federal Rule of Civil Procedure 1 provides that they "shall be construed to secure the just, speedy and inexpensive determination of every action." Respondent employed Rule 56(c) to opposite effect in the instant case. Wainwright simply cannot believe that the Eleventh Circuit's toleration of Smith's skillful manipulation of our criminal justice system, Smith v. Wainwright, 777 F.2d 609, 616-617, note 6, reflects the law of this land. He would respectfully ask this Court

to grant certiorari here to clarify that it does not. Rules 17.1(a) and (c), Rules of the Supreme Court of the United States.

CONCLUSION

WHEREFORE petitioner, Louie L. Wainwright, as Secretary of the Florida Department of Corrections, respectfully submits that this Honorable Court should GRANT his petition for writ of certiorari and REVERSE that portion of the Eleventh Circuit's decision mandating an evidentiary hearing into the competence of trial counsel with directions that the decision of the Federal District Court for the Northern District of Florida denying all relief be REINSTATED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a total of three true copies of the foregoing "Petitioner for Writ of Certiorari...Reply Brief" have been forwarded to Ms. Sarah M. Bleakley, 1529 Coombs Drive, Tallahassee, FL 32308, Mr. Julian Clarkson, Law Offices of Holland and Knight, P.O. Drawer 810, Tallahassee, FL 32302, and Mr. Gregg D. Thomas, P.O. Box 1288, Tampa, FL 32202, Attorneys for Respondent, by U.S. Mail this 9th day of June, 1986.

John W. Tiedemann

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